IN THE

Supreme Court of the United States

No. 91.

JAMES S. SPEARS et al., Appellants,

vs.

JONATHAN K. GAPEN et al., Appellees.

Supplement to Appellants' Brief.

COPIES OF STATUTES AND ADDITIONAL SUGGESTIONS AND AUTHORITIES.

By HILL & NICHOL,
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thereof belonging to the State, and the net proceeds of tolls collected on said canal, or any part thereof as finished, the sufficiency of which, for the purposes aforesaid, as above provided for, the State of Indiana doth hereby irrevocably guarantee."

Acts of 1836, page 6:

Section 1 provides for board of internal improvements, of which the canal commissioners appointed under former acts are to be a part.

Section 4 authorizes certain public works, viz.:

1st. Whitewater Canal, $1,400,000 appropriated.

2d. Central Canal, $3,500,000 appropriated.

3d. Extension of Wabash and Erie Canal from mouth of Tippecanoe River to Terre Haute and beyond, $1,300,000.

4th. Railroad from Madison through Columbus, Indianapolis, and Crawfordsville to Lafayette, $1,300,000.

5th. Macadamized turnpike from New Albany to near Fredericksburg, $1,150,000.

6th. Railroad or macadamized road from Jeffersonville to Cawfordsville, $1,300,000.

7th. Removing obstructions from Wabash River, $50,000.

8th. Railroad or canal from Fort Wayne to Michigan City, faith of State pledged.

SEC. 7. Fund for internal improvements created, consisting of moneys raised by sale of stocks or other loans, appropriations heretofore made, or hereafter to be made, tolls and rents of said works, grants or donations from individuals, with profits or interests from their construction.

SEC. 8. Authorizes $10,000,000 loan for twenty-five years at five per cent., for which transferable certificates of stock are to be issued.

SEC. 9. "For the punctual payment of the interest and final redemption of the principal of all sums of money which may be borrowed under the provisions of this act, there shall be irrevocably pledged and appropriated the canals, rail and turnpike roads, with the portions of ground thereunto appertaining and privileges thereby created, and the rents and profits of the water power thereof, together with the net proceeds of the tolls collected thereon; the sufficiency of which for the purposes aforesaid the State of Indiana doth hereby irrevocably guarantee."

SEC. 10. Authorizes additional loan of not exceeding $500,000 to finish the W. & E. Canal between the Ohio State line and the mouth of the Tippecanoe River. Loan to be governed by W. & E. loan statutes heretofore enacted, "and for the punctual payment of the principal and interest on said loan or loans, the said canal, when constructed, its tolls, its interest and profits derived therefrom, and the proceeds of the canal lands are hereby pledged; the sufficiency of which to pay the interest and principal of said loan or loans as the same shall become due, the State hereby guarantees."

SEC. 11. Provides that distinct accounts shall be kept of disbursements in construction of that part of the canal east of Tippecanoe River, which amount "shall be charged to and paid out of the canal fund." Also tolls on that part and proceeds and sale of canal lands to be kept separate, that they "may be strictly applied to the payment of the canal fund, for which by various acts of the general assembly they have been specifically pledged."

SEC. 22. Provides for procuring site for water power.

SEC. 23. Provides for leasing water power.

SECS. 25 to 32. Provide for means by sale of bonds to build the Lawrenceburg and Indianapolis Railroad.

SECS. 33 to 41. Provide for building the Madison and Indianapolis Railroad, by means obtained in the same way.

Acts of 1846, page 3.

Act approved January 19, 1846.

Extract from section 1:

"Whenever the holder of any bond or bonds of this State, (the bonds issued under the original bank charter excepted,) shall choose to surrender the same up to the State, there shall be issued to such holder a new certificate of stock, which stock shall be redeemable at the pleasure of the State, after twenty years," &c.

Extracts from section 8:

"*Second.* The balance of the proceeds of said lands, (if any,) and the tolls and revenues of said canal, up to and including the first day of January, 1853, *after defraying all needful and proper expenditures for repairs, attendance, and other causes*, to be applied as follows, and in the following order," &c.: * * *

"From and after the first day of January, 1853, an account of the tolls and revenues of, and expenditures on, that portion of the canal between Lafayette (inclusive) and the Ohio State line, shall be kept separate and distinct from a like account of that portion between Lafayette (exclusive) and Evansville, and from and after that period the tolls and revenues derived from the first-named portion, *after defraying necessary expenses, repairs, and outlays*, shall first be applied to make the full interest of five per centum per annum on the certificates of stock that may be issued for the bonds now outstanding, and known as the Wabash and Erie Canal bonds," &c.

Extract from section 12:

"The trust hereby created shall cease and be determined

whenever the moneys advanced for the completion of said canal, with the interest and the special stock aforesaid, shall shall have been paid and refunded, and the State shall have taken up and retired one-half of the stock issued by virtue of the first section of this act, and shall assume the payment of interest at the rate of five per centum per annum on the balance; which the State assumes the right of doing at its pleasure," &c.

Extract from section 13:

"The tolls and revenues of said canal shall be applied to the repairs and expenses thereof, and the extension of the same, until the first day of January, 1847; from which period, and up to and including the first day of January, 1853, said tolls and revenues, *after defraying all needful expenditures, and outlays for repairs, attendance, and other necessary things appertaining thereto*, shall be applied, subject to the limitations contained in the eighth section of this act, to the payment of the two and a half per centum interest unprovided for by the State, on the principal of the surrendered bonds, from the first day of January, 1847, to the first day of January, 1853, at which time the deficiencies (if any) of said tolls and revenues to discharge said interest shall be added to the unprovided for two and a half per centum on the principal of said bonds surrendered, from the first day of January, 1841, to the first day of January, 1847, and the sum thereof shall be converted into the special stock hereinbefore referred to, the principal and interest of which shall be only payable out of the said canal lands and tolls and revenues of said canal, as hereinbefore provided; and for which proper certificates of stock shall be issued. But for the redemption of said principal, or the payment of said interest, the faith of the State is in nowise pledged."

Extract from section 32:

"It shall be optional with the State at any time hereafter to call in and require a surrender of the outstanding stock issued under the first section of this act by giving to the holders of such stock a new certificate for the one-half of the principal thereof, to bear interest at the rate of five per

centum per annum, and which principal and interest shall be payable and redeemable by the State out of the revenues thereof, the principal to be payable at the pleasure of the State, and by giving to such holder another certificate for the other half of the principal of such stock, to bear a like interest of five per centum per annum, and to be paid and redeemed, and only paid and redeemed out of said canal lands and the tolls and revenues of said canal, as provided in the eighth section of this act," &c.

Acts of 1847, page 3:

"SECTION 1. *Be it enacted, &c.*, And it is hereby declared, in virtue and exercise of the *option* reserved to the State by the thirty-second section of the said act, that the outstanding bonds of the State shall be surrendered by the holders thereof, and a new issue made in exchange therefor of two certificates to be respectively signed and sealed, and otherwise verified by or on behalf of the State, as provided in the second section of said act. *Each* such certificate to be for an *equal moiety* of the principal money seecured by the bond or bonds for which the same shall be exchanged, and to bear interest at and after the rate of five per centum per annum, as provided by the thirty-second section of said act, such interest to be computed from the first day of January, 1847; that one of such certificates, with interest thereon as aforesaid, shall be paid by the State out of the *revenues* thereof, as provided in the said thirty-second section of the said act, and shall be redeemable at the pleasure of the State after twenty years, as provided in the first section of the same act; and the other of such certificates, with interest thereon as aforesaid, shall be paid out of the canal lands and the tolls and revenues of the said canal, as also provided by the thirty-second section of the said act; and that such certificates, in the form mentioned in schedule of this act, shall be issuable as provided in the second section of said act, as modified by this."

Extract from section 8:

"*Provided, further*, That the State will make no provision whatever, hereafter, to pay either principal or interest, on any internal improvement bond or bonds, until the holder or holders thereof shall have first surrendered said bonds

to the agent of State, and shall have received in lieu thereof certificates of stock, as provided in the first section of this act, anything in this act to the contrary notwithstanding."

Extract from section 9:

"*Provided further*, And it is hereby enacted that, unless holders of bonds to the amount of four millions of dollars, as provided for in the seventh section of this act, shall *bona fide* subscribe five per centum on that amount, and pay such last mentioned per centage to the trustees as aforesaid on or before the said 1st day of June, 1847; and unless bonds to the amount of four millions of dollars, exclusive of interest, shall be surrendered for cancellation, as provided in said original act, as modified by this, on or before the 1st day of July next, then, and in that case, the said former act, and this act, and every clause, proviso, matter, and thing therein and herein respectively contained shall cease, determine, and be utterly void."

Extract from section 10:

"That in lieu and stead of the scale of distribution and application, as in the eighth and thirteenth sections of said act directed, of the tolls and revenues of said canal, *after defraying all needful and proper expenditures for repairs, attendance, and other necessary things appertaining thereto, which shall be first paid, anything in the said former act or this act to the contrary notwithstanding;* and of the produce of the said canal lands, (sold and unsold,) the same shall be held and applied by said trustees in trust and security, for the uses and purposes following, that is to say:"
[Here follow ten specifications of the order of priority of payment.] *. * * "saving the just rights of the holders of bonds now outstanding and known as the Wabash and Erie canal bonds, as provided for in the eighth section of this act."

Section 22:

"The debt which it is the object of the trust created by the said recited act (as amended by this act) to liquidate, as in the said act is mentioned, having been contracted under the authority of the State of Indiana, and for the service

of the people of that State, and it being desirable, as well for the credit of the State, as also in order to establish confidence in the public in general, and the subscribers in particular, to secure the utmost punctuality in the fulfilment of the objects of the said trust, it is hereby declared that the tolls and revenues of the said canal, present and future, and the lands and lots so conveyed, or intended to be conveyed as hereinbefore mentioned, and the proceeds thereof, when sold, shall be, and the same are hereby, specifically pledged to form a distinct and particular fund for the redemption of the stock and certificates to be issued in pursuance of the said recited act and of this act, and the said State shall not direct or permit any appropriation to be made of such tolls and revenues, lands and proceeds, or any of them, for the general purposes of the State, or otherwise howsoever, other than and except for the said trust as directed by the said act, (as amended by this act,) until the said stock and certificates, and all interest thereon, shall have been fully paid and satisfied, out of the tolls and revenues of said canal, or the State shall have redeemed said stock and certificates, by the payment of the principal thereof; the right of doing which, after twenty years from the 19th day of January, 1846, is hereby reserved by the State, as provided in the act to which this is an amendment."

Form of certificate for principal moneys chargeable on the canal, lands, tolls, &c. (see page 35):

"1000. No. ——.

UNITED STATES OF AMERICA.

State of Indiana.

Five per centum Canal Stock.

Under two acts of the General Assembly of the State of Indiana, entitled 'An act to provide for the funded debt of the State of Indiana, and for the completion of the Wabash and Erie Canal to Evansville,' passed nineteenth January, 1846, and 'An act supplementary to said act,' passed ——, 1847.

Principal chargeable on the Wabash and Erie Canal, tolls, lands, &c., pursuant to acts of the Legislature of Indiana, passed the 19th of January, 1846, and on ———, 1847.

Be it known, that the Wabash and Erie Canal, and all tolls, lands, and effects appertaining thereto, from the State line to Evansville, on the Ohio River, as described in the above-mentioned acts of the Legislature, and all the property of the State of Indiana therein, are irrevocably pledged, in virtue of the said acts, to A. B., and his assigns, for the sum of one thousand dollars, represented by this certificate, (forming part of the bonds of the State declared to have been surrendered by an act of surrender of this date,) together with interest upon the same, at the rate of five per centum per annum, from the first of January, 1847, payable semi-annually, by *equal payments*, at the times and in form and manner prescribed in the acts of the Legislature of the State of Indiana above mentioned."

Additional Points and Authorities.

The underlying and only question of law raised by the demurrer, and which decides this case, is, we think, this: When Spears and Case accepted the proffer of the State, made in the act of 20th January, 1842, (see Pl'tf's Brief, pp. 7, 8,) entered into a contract to do the proposed work, and to accept the pay, as provided in said act, and then completed the work according to said contract,—do these facts work a grant or an assignment of, or charge upon, or interest in the said rents which the third section of said act makes to be the pay for said work?

The contract is averred in the petition (R. 30) to have been one made "to construct and complete the said work, as provided for by said act." It was therefore a contract which *embodied into its terms* the said act, and makes its provisions parts of the contract.

The substance and result of it, therefore, were, that the rents of the water power created under the act should all be appropriated to pay for said work, and for no other purpose; and that the persons doing the work should "*look to*" the rents for their pay, and to no other source whatever.

Such was the contract, and it was fully executed by doing the work as agreed.

Did the doing of the work under such a contract create a property in the rents themselves, which made out a grant of or charge upon them?

In considering this question, please observe that the same act (secs. 4 and 5) and the contract thereunder contemplated and provided for the leasing of said power and the immediate creation of said rents, and that they *were created* and existed before the State sold the canal. There is, therefore, no uncertainty as to what was pledged or granted.

Here, then, was a contract agreeing, on the part of the State, that *all* of certain designated rents should be appropriated exclusively to pay for work that was to create the rents until the work was paid for; and the rents were created as agreed, and on the part of them doing the work there was a covenant that these rents, and *nothing else* "whatever," should be "*looked to*" to pay for the work, and of course that no assumpsit of the State should be looked to, to which the rents should stand in the relation of collateral or otherwise. And *that* contract was duly and fully executed by doing the work on the faith of said covenants.

And thus is presented the question on which, we think, this case turns, to wit, where one agrees that all of a designated property shall be applied exclusively to pay for designated future work, and that said property shall be looked to, and nothing else than such designated property should be "*looked to*," and on the faith of such covenants the work is done, there may said designated property be "looked to;" that is, does such a transaction create a charge on the property?

Such is *the* question in this case.

In answering it, we would remark—

1. The question is in principle answered by the case of Trustees *v.* Beers, 2 Bl., 448, where this court held that

such legislation as that contained in the fifth section of the act of the Legislature of Indiana of 7th January, 1832, did create a lien upon and property in the money Indiana might derive from certain lands, or from this same canal, or from the *rents* and profits of the canal, or from the net proceeds of its tolls.

And this court did not suffer the fact that the *management of the canal, the collection of its tolls, the renting of its water power, and the collection of such rents, were all left under the control of the State to prevent a lien upon the rents, &c., from attaching to such rents in virtue of said section* 5.

This court held more than this: that it made a contract with those who parted with value on the faith of the promise contained in said section 5, which put the *said rents* forever beyond the State's power of recall. And this court so held that said section 5 gave such an irrevocable property in said rents, &c., although the party who acquired said lien held also (what Spears and Case never got, to wit) *the separate promise* of the State to pay the debt so secured.

In view of this holding by this court as to section 5 creating a property in the rents of the canal, please observe wherein is section 5 stronger, as tending to give a property in the rents, than is section 3 of said act of 20th January, 1842?

The words of section 5 are: "There shall be, and hereby are, irrevocably appropriated." The words of section 3 are: "For the purpose of paying for said work, the rents that may be received by the State for the power created by this act shall be *appropriated* for that purpose, and to *no other* purpose, and the person or persons doing said work *shall look to* the said rents for their pay, *and to no other source whatever*."

This court said that when the citizen parted with his money, and bought a bond on the faith of said words in section 5, then there was an irrevocable transfer to the bondholder of a specific lien upon the canal, &c.

The court below in this case said that when Spears and Case parted with their money on the faith of the pledge by the State that these rents should be exclusively "appropriated" to their pay, and that Spears and Case should "*look to*" the rents, and should *look to nothing else*, then and thereby Spears and Case got no property in the power or its rents—got nothing save a contingent revocable *promise* by the State that *during the State's convenience and pleasure* it would hand over the rents if it should not otherwise dispose of them, or had not otherwise disposed of them.

Our point on this decision in Trustees *v.* Beers is this: That appellants' parting with value on the faith of a covenant, is just as effectual, in creating vested property rights in the rents, as is the parting with value by the bondholders in the case of Beers; that the words of the covenant in our case that the rents should be "appropriated" to us and to nothing else, and that we should "*look to*" the rents and nothing else for our pay, are quite as strong, in the way of indicating and making an actual pledge or grant of the property, as are said words of section 5. There is no *magic* in *words*.

The fact that section 3 said, in express words, we should "*look to*" the rents, is as effectual a grant or a pledging of the rents themselves as could be accomplished by means of any other words. And the further words, that we should look to nothing else, makes the intent to pledge the rents absolutely irresistible; and as a pledging makes our case, in a court of conscience, stronger than is the case of Beers. This, because in the latter case the State gave, and the creditor took, the *assumpsit* of the State in the form of a bond; whilst in our case not only was there no separate promise to pay, but all such separate promise was negatived by the covenant that we should "look to" the rents, and nothing else.

To deny us the right to "look to" the rents themselves as a thing pledged, is not only to defy the very letter of

the obligation, but is to rob the pledgee, after the State got his money, of the entire and only thing to which the very letter of the obligation suffered him ever to "look" for his pay.

We insist, therefore, that in exact principle Trustees *v.* Beers decides that Spears and Case acquired a property in these rents in virtue of the said contract and its performance.

2. But aside from the point, just stated, that this question of the actual grant or pledging of the rent is decided by Trustees *v.* Beers, we now proceed to state other considerations leading to the same result.

These may be presented in various aspects.

We state one of these aspects in the words of Hare and Wallace, 3 Lead. Cases in Eq., 3d Am. ed., 357:

"*Anything* which shows an intention to assign, on the one side, and from which an assent to receive may be inferred on the other, will operate as an assignment if sustained by a sufficient consideration. Thus a promise to pay out of a particular fund when received will be specifically enforced in equity, and thus operate as an assignment, especially when the circumstances are such as to show that the promise was given as a security for money lent, and was relied on as such by the lender.

Buck *v.* Swazey, 35 Maine, 41.

"And in this, as in other agreements, no writing *or particular form of words is necessary* if the consideration be proved, and the *meaning* of the parties apparent. * * * The same thing has been held of an assignment of rent before it is due; *while savoring of the reality*, and not merely of personal obligation.—Morton *v.* Naylor, 1 Hill, 583; Esling *v.* Zantzinger, 1 Harris, 50."

To the same effect, to wit, that no form of words is required to create a grant or assignment in equity, is the language of Lord Hardwick in the principal case of Row *v.* Dawson, 1 Ves., 331, found in 3 Lead. Cas. Eq., s. p. 612,

where he says such assignments are good "although no special form is used," and in the notes of the English editors the same thing is said and the authorities cited, in these words: (3 Lead. Cas. Eq., s. p. 653, top p. 307, 3d Am. Ed.) "It is clear, as laid down by Lord Hardwick in the principal case of Row *v.* Dawson, that 'no particular words are necessary.' *Any words are sufficient which show an intention of transferring or appropriating the chose in action to or for the use of the assignee.*"

See Thompson *v.* Speirs, 13 Simons, 469.
Burn *v.* Carvalho, 4 Mylne and Craig, 690.
Cook *v.* Black, 1 Hare, 390.
McFadden *v.* Jenkyns, 1 Hare, 458.
Malcolm *v.* Scott, 3 Hare, 39, 52; 6 Hare, 570.
United Guarantee Co. *ads* Myer, 7 De Gex, Macn. and Gran., 112.

So, also, to the same effect, that an agreement between parties that a particular fund or property shall be taken, held, or appropriated to pay a designated debt, *when acted on and executed* by payment of a consideration for such promise, constitutes an assignment in equity of such fund, is stated in these words by Lord Truro in the case of Roderick *v.* Gandall, 1 De Gex, Macnaghten & Granger, 763: "The extent of the principle to be deduced from the cases, is that an agreement between a debtor and creditor, that the debt owing shall be paid out of a specific fund coming to the debtor," * * * * "will create a valid equitable charge upon the fund; in other words, will operate as an equitable assignment of the debt or fund." (See 3 Lead. Cas. in Eq., 3d Am. Ed., 310.)

Still again, the same thing, namely, that where one agrees to pay another out of a specific thing, whether a fund, or rents, or other thing, which the promisee stipulates to render services in the effort to recover, or produce, or create,

and the service is rendered, and the thing is created or produced, there the promisee holds a lien on the thing so produced, was decided by this court in Wiley *v.* Cox, 15 How., 415–420, where this court says: "The evidence shows that the complainant was to receive a contingent fee of five per centum out of the fund awarded, whether money or scrip. This being the contract, *it constituted a lien upon the fund*, whether it should be money or scrip. *The fund was* LOOKED TO, *and not the personal responsibility of the owner of the claim.*"

Here, it will be observed, this court gives what is the true test of the distinction which separates such cases as Trist *v.* Child, 21 Wall., 441; Christmas *v.* Russell, 14 Wall., 69, holding that a mere promise to pay out of a designated fund, no intent to actually "*appropriate*" the fund *pro tanto* being disclosed by the words used, will not create an equitable assignment, and the other class where the agreement does work an assignment. The court gives that test in these words:

The fund must "be looked to, and not the personal responsibility of the owner of the claim."

Had this court been here attempting to describe the character of the assignment made by this act of 20th of January, 1842, and by the contract made with the plaintiffs thereunder, it could have found no words more literally and exactly a description of the assignment to us than the words here employed by this court as descriptive of a contract which will create a lien. Indeed, the court uses the identical words of our assignment, and uses all the operative and controlling words. The fund was "*looked to*," says the court. The fund (rents) must be "looked to," says the statute. The personal responsibility of the owner of the fund or claim must not be looked to, says the court. Neither the responsibility of Indiana nor anything else "whatever" than the rents shall be "looked to," says the statute and contract thereunder. So that, from this court,

we have the explicit and direct judgment that precisely such an executed agreement as ours does operate to transfer the fund *pro tanto*, and is one which creates a lien on the fund.

See the case of First National Bank of Cincinnati *v.* Kersey *et al.*, reported in Inter. Rev. Rec., October 3, 1881, p. 312, decided in the U. S. Cir. Ct., western district of Missouri, May term, 1881, by Justice Miller, where he holds a bank check operates in equity as an assignment of the amount drawn for.

Again. There is still another aspect of this case in which it has been decided by this court. It is this: where a contract is one *inter parties*, and, whilst yet executory, is only a covenant for the assignment or grant of property, choses, or any other thing which may be assigned, and on the faith of such covenant the party who was to become the assignee performs his part of the contract, there the transaction results in and makes a grant, at least in equity.

In Fletcher *v.* Peck, 6 Cr., 137, this court was called upon to decide what the legal effect was of the execution of a contract authorized to be made by a law of Georgia. That law authorized the sale and conveyance by the governor of certain lands. Under it the governor made the sales and executed the grant; and afterwards Georgia repealed said law and sought to destroy said grant. Regarding this attempt, and regarding an executed contract being a grant, the court says (p. 137):

"A contract *executed* is one in which the object of the contract is performed. And this, says Blackstone, *differs in nothing from a grant*. The contract between Georgia and the purchaser was *executed* by the grant. A contract executed, as well as a contract executory, contains obligations binding on both parties."

The application of this case to the present is simply that it classes *executed contracts* with grants, and grants with executed contracts, and puts them together and alike, in the

obligations they impose and secure, beyond the power of impairment by the State. This and like cases are but the assertion of the doctrine found in such cases as

Watson *v.* Bagley, 2 Jones, (N. C.,) 164;
Sharpless *v.* Welch, 4 Dallas, 279;
Steamship Co. *v.* Joliff, 2 Wall., 450;

which hold that where parties holding powers or covenants which, *before execution*, would only amount to *authority* to acquire and hold property, go forward and execute the contract or power, on their part, in good faith, there such *execution* turns the power or covenant into a *trust* or *grant* or equitable assignment, accordingly as may be requisite to satisfy the terms of the instrument so acted upon and executed.

The same principle is stated in another from by the eminent authority already quoted (Hare and Wallace) in these words:

"It should be, however, remembered that *everything* will operate as an assignment in equity which makes it a duty to assign, and gives one party a just claim to the rights and remedies of the other." * * * Hart *v.* R. R. Co., 13 Metcalf, 99–108. (See 3 Lead. Cas. Eq., 3d Am. ed., 362.)

It is upon this doctrine are based most of the leading and most salutary jurisdictions of courts of equity—such as specific performance of contracts; subrogation of sureties to the rights and remedies of principals; enforcement of contracts taken, by performance, out of the statute of fraud, and many others of kindred nature.

One other aspect of this question of this being a grant we will notice. It is this: This transfer of these rents to Spears and Case is accomplished by an act of the State, which (after execution of the contract) operates in making the transfer not only a *grant* or *pledge*, but also as a *law*. These two operations of legislative grants are familiar to this court, having been often recognized and enforced.

This *law* which "*appropriates*" (that is the word of the act) these rents to pay for this work, and commands that it shall be "appropriated" to no other purpose, was a *law* perfectly competent to be passed. It is binding as a "*law*" upon this property within the State, and (subject to any other then outstanding liens, if any were) was under the State's dominion as a law-making power and as owner. That law—saying the rents shall be paid to the plaintiffs—has never been repealed, and is in force to-day. As such, all courts, including the Federal, are bound to obey and execute it as one "appropriating" these rents to pay the plaintiffs.

We therefore conclude this point in the case by saying that the authorities cited, and the palpable justice and reason of the matter, make out what is simply a demonstration that these rents were transferred and pledged to plaintiffs, and that they *did* hold, in virtue of the pledge, a vested property interest in them cognizable in courts of equity, and protected by all constitutional guarantees protective of property and of contracts.

And this brings us to the question whether anything in the petition demurred to shows that that vested interest has become extinct, or is overridden by any higher equity or prior claim as disclosed by the record.

Lien on Rents not Released.

The petition demurred to and all the facts of the record show that plaintiffs have done no act, either under the acts of 19th of January, 1846, and 27th of January, 1847, or either of them, or in any other way tending to waive, or which are claimed to have waived or impaired, any interest or lien held by them. They have simply, so far as any waiver of their lien is concerned, "remained"—to here adopt the language of this court, (2 Bl., 454,)—"entirely

aloof," with this exception, that the demurrer to the petition admits the averments of plaintiffs' petition that the rents of said water power were paid to plaintiffs as agreed up to November 1, 1875, (R. 31,) and until after the court, in this case, placed the property in the hands of its trustees on 17th July, 1875. (R. 20.)

This action of plaintiffs was not only not of a kind capable of being construed into a *waiver* of any lien, but was, on the contrary, an express assertion of the *continuance* thereof after the property was deeded by the governor, on 30th July, 1847, to the trustees pursuant to the acts of 19th of January, 1846, and of 27th January, 1847. And, more than this, it was a recognition by the grantees under said last-named deed that no statute nor act thereunder had changed plaintiffs' said rights in said rents.

That the lien continues if not waived by plaintiffs, we insist is plain.

Even if the legislation of 1846 and 1847, ordering this canal property to be deeded to trustees, &c., &c., could be construed as an abolishment or repeal of the said act of 20th of January, 1842, under which we did said work, then such law *could* not so operate, because it would be an attempt to divest our vested interest in the rents. This court so held as to this very transaction in the case cited above of

Trustees *v.* Beers, 2 Bl., 448. Also see
Fletcher *v.* Peck, 6 Cr., 137.
Steamship Co. *v.* Joliff, 2 Wall., 450.

Our lien, therefore, continues in these now existing rents, or else in the money in court which their sale has produced, if the rents are to be treated, as against Spears and Case, as actually sold.

RIGHTS IN RENTS DID NOT EXPIRE WITH STATE CONTROL.

We understand that the claim is made that the contract, created under the act of 20th January, 1842, and its com-

plete execution, even conceding that these created a lien in favor Spears and Case during the time the State might own and control the canal, made no lien on the rents which was to *endure* longer than such control by the State; that by the very nature and terms of the transaction our rights in the rents must end when the State ceased to keep up and manage the canal. Another form of stating this point is, that the contract of the State with Spears and Case was not one stipulating that the debt should be paid *at all events*, but only that these rents should be paid to Spears and Case so long only as the rents should remain under the control of the State in their original character of income from surplus water, and having ceased to be of that character the rights of Spears and Case in the rents have ceased.

In noticing this point it must be observed that it is not one asserting that Spears and Case must now look for their rights to the proceeds of the sale in court. It is, on the other hand, one which asserts that their lien had, from its origin, the infirmity that it only pledged these rents so long as the State continued to run the canal and to deal out this water as a surplus, not required by the State for navigation. It seems to us that the replies to this position are very obvious and conclusive.

The whole theory and basis upon which the original bill proceeds is that the State, in creating this canal and these water powers, became thereby the *full and absolute* owner of property therein—property which the State could own, hold, mortgage, lease, sell, grant, and convey, just as *any other* owner could. That in this power and dominion was included the power to sell the canal and water power to any other party, and to give to its assignee, or vendee, the power to run the canal just as the State could. That such ownership in the State and power of sale carried with it the right and power of creditors and lien-holders to avail themselves of *all* the remedies known to courts of law and equity

to enforce, as against such property, (excluding now the non-suability of the State,) their rights in said State property. When *such* a property is thus brought into the courts for sale to enforce property rights therein, it goes there just like the property of an individual, subject to all liens, equities, possibilities as to future use, and priorities of claims which attached to it in the hands of the State. Amongst these things so subject to the court's order of sale, was the right to sell to a purchaser the future *use* of the canal, *as and for a canal*, and also all its water powers and their *future use*.

Undeniably *this* is just what the court below was invoked by the original bill to sell, and what it did sell. We are not now saying whether they sold the future use of our water power, *free from* or *subject to* the payment of our rents. We are only saying that the thing the State gave us our lien upon was a property which, *in law and fact*, had a duration—a *property character*—which was perpetual—capable of lasting forever—which could be so mortgaged or charged, and so sold—could be followed by the liens created therein *after* the sale by the State, and which *are*, in the very nature of the case, subject to be charged with liens which *may* adhere to the property and its use *after* a sale by the State.

And, as a corollary of this, we are insisting, as a result, that every lien given on *such* a property, so capable of *enduring* and being charged and sold by the State, will adhere to the property until satisfied; that *unless limited as to its duration by some term of the instrument giving the lien*, then, like all other such liens, the intendment of the law is that they shall follow the property into all hands, and through all changes of the form of the property, as long as a court of equity can trace the property or identify its proceeds.

This last proposition, that the law will *intend* that a lien on property for securement of a debt will, in the absence

of terms limiting the extent or duration of the lien, cover and embrace the entire estate which the mortgagor could convey, is one so elementary and obvious that one hesitates to state it. But it seems to us that the position we resist is one which denies precisely this proposition, and says that when the State pledged to us its *property* in these rents, it did not pledge *all* the estate it then held and could charge, but only such portion thereof as would convey a use during the time the State might choose to retain the control of such rents.

We have said that in the absence of some term in the instrument creating the mortgage or pledge, limiting the estate conveyed by the mortgage to a less interest in the property mortgaged than the *entire* estate held by the mortgagor at the time of the mortgage, there the mortgage will be held to convey the entire interest so held by the mortgagor.

This brings us to the point, is there anything in the act of 20th January, 1842, which limits the assignment by the State to Spears and Case to a less period of enjoyment of said rents than it was within the power of the State then to mortgage or convey?

Looking to that act, it will be found that there is not only nothing so limiting the extent of the estate so conveyed to Spears and Case, but that the said act, on the contrary, in express words makes the conveyance one to continue until the whole amount is paid. The words are at the end of section 3: "And as fast as the said rents may be due or received they shall be expended in paying for said work, until *the whole amount is paid*."

The opposing brief of Mr. Taylor closes by saying that this was not a conveyance or promise securing that "the cost of the works should be paid at all events."

The third section says that the obligation should continue "until the whole amount is paid." It would be impossible to adopt language more conclusive as showing an

intent by the Legislature to make a contract or assignment which should endure after the State might cease to control the rents, if such control should cease before such whole amount was paid.

Again, were there any doubt regarding the proposition we have just stated, it would be removed by the act approved January 9, 1846, found on page 10 of appellant's brief. This act was approved, it will be observed, on the *same* day on which was approved the act mentioned in the second page of the record, entitled "Act to provide for the funded debt of the State of Indiana, and for the completion of the Wabash and Erie Canal to Evansville."

The act found upon the tenth page of appellant's brief requires the officer having charge of the canal to settle with Spears and Case for their said work, and to give a certificate for the amount of work done under said act of 1842, and then proceeds to provide in these words: "Which shall be paid out of the rents derived from the water power created by said act, cut and constructed by said Spears and Case near said town, and said certificate shall draw 6 per cent from the time the contract was completed by said Spears and Case until payment thereof shall be made."

The certificate provided for in this act is found on eleventh page of appellant's brief, is dated 29th September, 1847, finds $10,354.20 due for said work, bearing interest from the completion of the work, on 1st of December, 1843.

Here, then, we have an act of 19th January, 1846, *in pari materia* with the said other act of the same date providing for the conveyance of the said canal and water power by the governor to a corporation named "The Board of Trustees of the Wabash and Erie Canal."

This act so *in pari materia*, and which becomes part of the act providing for said conveyance, (see the cases Sedgw. Stats., pp. 209, 210, and notes; 11 Wh., pp. 384, 385, 386; 4 McL., p. 489,) which, in express terms, declares and directs, *as to the future and after the conveyance by the governor*, that

Spears and Case "shall be paid out of the rents derived from the water power created by said cut constructed by said Spears and Case."

As a legislative interpretation of said act of 1842, this last act, we submit, is *as* conclusive of the design of the act of 1842 to continue our lien after the State's control of the water power ceased, as any legislative interpretation *can* be.

But this last act of 20th January, 1846, is much more than a legislative *interpretation* of the act of 1842. It operates as both a *law* and a *grant*, securing to Spears and Case these rents *in the future;* and it being of the same date as and *in pari materia* with said act under which the governor made said deed, operated by its own vigor to continue said charge or lien on the rents, and to continue such lien in the hands of the governor, and this until said debt should be paid.

The result, therefore, is that these rents were subject to said charge or assignment up to the sale of the canal under the order of the court. All persons taking the canal bonds under said acts of January 20, 1846, and 27th of January, 1847, did so with full notice that our claim to the rents was so preserved and continued, and they took their new securities subject to our said lien and equities.

Lien of 1842 the First on Said Power.

If it should be claimed that the pleadings reached by the demurrer disclose that our lien or grant of 1842 cannot be reached by reason of prior liens which will consume all the proceeds of this sale now in court, and that hence the demurrers ought to be sustained, there are several replies to this, only one or two of which we will here notice.

One is, that there is nothing in this record, or in the pleadings reached by the demurrers, which discloses this

as a *fact*, even if it be assumed that those claiming under the equities of the original bill are to be regarded as prior to us in equity.

That is a fact to be determined by an *accounting*, and not by these demurrers.

But, second, the lien created by the act of 1842 creates a lien on said *power* contemporaneous with its creation, and which passed over to the State and to all holders of liens on the canal, &c., subject to and qualified by the grant to Spears and Case, as given under the act of 1842.

In legal effect, exactly this is decided by United States *v.* N. O. R. R. Co., 12 Wall., 362. See also, 1 Jones on Mortg., secs. 358–360.

SHELLABARGER & WILSON.
HILL & NICHOL.

May 3

SUPREME COURT

OF THE

UNITED STATES.

FRENCH, HANNA & CO., *Appellant.*

vs.

JONATHAN K. GAPIN, *et. al.*

No. 327.